

WO

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Wells Fargo Bank NA, et al.,

No. CV-13-01475-PHX-DGC

Plaintiffs,

ORDER

V.

Breakwater Equity Partners LLC, et al.,

Defendants.

Plaintiff 4801 East Washington Street Holdings, Inc. filed an action against Defendants Breakwater Equity Partners, LLC and Thompson National Properties, LLC (“TNP”) alleging conversion, fraudulent transfer, and breach of contract arising out of Defendants’ transfer of Rents¹ generated from a commercial property. The parties filed cross-motions for summary judgment, and the Court granted Plaintiff’s motion on the conversion claim. Doc. 216.

In light of this ruling, the Court ordered the parties to submit a joint memorandum describing the issues remaining in the case. *Id.* at 16-17. The parties reported that several Defendants, referred to as the “Borrowers,” had been dismissed from the action by Plaintiff. Doc. 217 at 2. The parties agreed that the Court had found TNP and Breakwater liable for conversion, but disagreed on whether the Court had resolved the

¹ Capitalized words have the same meaning as in the relevant documents and the Court's prior orders.

1 amount of compensatory damages. *Id.* In addition, TNP filed a motion to determine the
 2 comparative fault among it, Breakwater, and the Borrowers. Doc. 222.

3 The Court directed the parties to file memoranda on these issues and, after further
 4 briefing, entered an order that supplemented its summary judgment ruling and awarded
 5 Plaintiff \$605,000 in compensatory damages. Doc. 230. Because the comparative fault
 6 issue had arisen only recently, the Court directed the parties to submit briefs regarding
 7 whether comparative fault or joint and several liability applied in this case. Doc. 230. In
 8 response, Plaintiff filed a motion for summary judgment (Doc. 232) and Defendants filed
 9 briefs and responses. Breakwater also filed a motion to strike Plaintiff's motion for
 10 summary judgment. Doc. 239.

11 The issues are fully briefed, and the Court finds that oral argument will not aid in
 12 the resolution of this matter. *See* LR Civ. 7.2(f). For the reasons stated below, the Court
 13 will grant Plaintiff's motion, deny Breakwater's motion, and terminate this case.

14 **I. Motion to Strike.**

15 Breakwater argues that Plaintiff's motion for summary judgment is untimely,
 16 prejudicial, infringes Defendants' right to a jury trial, and constitutes improper lawyering
 17 by the Court. Doc. 239. The Court does not agree.

18 Rule 56(f) provides that, after giving notice and a reasonable time to respond, a
 19 court may grant summary judgment to a non-movant, grant summary judgment on a
 20 ground not raised by the parties, or consider summary judgment on its own after
 21 identifying for the parties the material facts that may not be genuinely in dispute. Fed. R.
 22 Civ. P. 56(f). The Ninth Circuit has recognized the power of district courts to enter
 23 summary judgment *sua sponte*. *Gospel Missions of Am. v. City of Los Angeles*, 328 F.3d
 24 548, 553 (9th Cir. 2003). The intent of Rule 56(f) and this Ninth Circuit holding,
 25 obviously, is to permit courts to resolve issues that do not require a trial – issues that can
 26 and should be resolved on the basis of the law and undisputed facts.

27 Thus, although it is true that the comparative fault issue was not raised in
 28 Plaintiff's original motion for summary judgment, its was raised by TNP after the

1 summary judgment briefing (Doc. 222) and the Court has power to address it under
2 Rule 56(f) if undisputed facts allow for its resolution short of trial. Rule 1 requires the
3 Court to administer the Federal Rules of Civil Procedure to secure the just, speedy, and
4 inexpensive determination of every action. Fed. R. Civ. P. 1. Holding a jury trial on an
5 issue that can be resolved under Rule 56 would waste the time and money of the parties,
6 the jurors, and the Court.

7 The parties have had a full and fair opportunity to address the issues decided in
8 this order. The Court's ruling is based on facts addressed in three rounds of briefing, and
9 the parties have been afforded an opportunity to address the specific legal issues resolved
10 here. Breakwater complains that the briefing has not filed the traditional motion,
11 response, and reply format, but Breakwater has been given the opportunity to file a
12 memorandum and a reply *after* the issue to be addressed was identified for all parties.
13 Doc. 230 at 3-4. Breakwater's motion to strike will be denied.

14 **II. Joint and Several Liability.**

15 **A. Relevant Law.**

16 The Arizona Revised Statutes provide that “[t]he liability of each defendant is
17 several only and is not joint, except that a party is responsible for the fault of another
18 person . . . if . . . [b]oth the party and the other person were acting in concert.” A.R.S.
19 § 12-2506(D)(1). “‘Acting in concert’ means entering into a conscious agreement to
20 pursue a common plan or design to commit an intentional tort and actively taking part in
21 that intentional tort.” § 12-2506(F)(1). Thus, joint and several liability applies, rather
22 than comparative fault, if the parties “(a) knowingly agreed to commit an intentional tort
23 that (b) they were certain or substantially certain would result in the consequences
24 complained of, and (c) actively participated in the commission of the tort.” *Chappell v.*
25 *Wenholz*, 247 P.3d 192, 194 (Ariz. Ct. App. 2011) (citing *Mein ex rel. Mein v. Cook*, 193
26 P.3d 790, 793-94 (Ariz. Ct. App. 2008)). “If the actor knows that the consequences are
27 certain, or substantially certain, to result from his act, and still goes ahead, he is treated
28 by the law as if he had in fact desired to produce the result.” *Mein*, 193 P.3d at 794.

1 **B. Analysis.**

2 Plaintiff argues that Breakwater and TNP are jointly and severally liable for the
 3 \$605,000 in damages because they acted in concert to convert the funds. Plaintiff asserts
 4 that emails sent between Defendants establish that they had knowledge that the Rents
 5 were Plaintiff's property and that transferring the Rents out of the Operating Account
 6 would impair Plaintiff's control of the Rents. The Court agrees.

7 The Court has already concluded that, on January 11, 2013, the date on which the
 8 Loan went into default, Plaintiff was immediately entitled to all of the Rents. Doc. 216 at
 9 4, 10. It is undisputed that Defendants were aware of this fact and discussed the impact
 10 of the default. Counsel for both Breakwater and TNP recognized that the Rents
 11 "represent proceeds of the real property *which are technically the [Plaintiff's]*
 12 *collateral.*" Doc. 190-1 at 263, 267-68 (emphasis added). In fact, because of the
 13 potential legal consequences arising from Defendants' plan to transfer the Rents to other
 14 accounts after the default, TNP required indemnification from Breakwater and TNP's
 15 counsel recommended setting aside funds to pay for litigation likely to result from the
 16 "impending default, and the possibility [TNP] will get a notice from lender re no further
 17 use of rents[.]" *Id.* at 267. With full knowledge that the Rents were Plaintiff's property
 18 and that a lawsuit could result, TNP transferred nearly \$2 million in Rents to Breakwater.
 19 Doc. 216 at 4.

20 These undisputed facts show that Breakwater and TNP acted in concert to convert
 21 Plaintiff's Rents within the meaning of § 12-2506(D). The emails between Defendants'
 22 counsel show that Breakwater and TNP agreed to make the transfers. Both Defendants
 23 knew that the Rents were Plaintiff's property, and both intended to exercise dominion and
 24 control over that property. TNP made the transfers to Breakwater and retained nearly
 25 \$50,000 for its fee. Breakwater held the Rents in accounts over which it had control,
 26 made additional transfers to other parties, and retained over \$500,000 as its fee. This
 27 conduct shows that Breakwater and TNP knowingly agreed to convert the Rents and
 28 actively participated in the commission of the tort. *See Chappell*, 247 P.3d at 194.

1 Breakwater and TNP argue that the Borrowers directed them to make the transfers.
 2 They claim that the Borrowers are the real parties at fault and that they were merely
 3 acting as their agents. But the Court already rejected this defense in its prior order,
 4 noting that under Arizona law a party cannot escape liability for conversion merely
 5 because he was acting as an agent for his principal. Doc. 216 at 13. And this argument
 6 ignores the undisputed fact that Breakwater and TNP knew that Plaintiff was entitled to
 7 the Rents and nonetheless exercised control over them.

8 Defendants also argue that they did not intend to cause any injury to Plaintiff. The
 9 tort of conversion, however, does not require such intent. “Conversion is an intentional
 10 exercise of dominion or control over a chattel which so seriously interferes with the right
 11 of another to control it that the actor may justly be required to pay the other the full value
 12 of the chattel.” *Miller v. Hehlen*, 104 P.3d 193, 203 (Ariz. Ct. App. 2005) (citing
 13 Restatement (Second) of Torts § 222A(1) (1965)). “[T]he intent required is not
 14 necessarily a matter of conscious wrongdoing,” rather it is the “intent to exercise a
 15 dominion or control over the goods which is in fact inconsistent with plaintiff’s rights.”
 16 *Matter of 1969 Chevrolet*, 656 P.2d 646, 650 (Ariz. Ct. App. 1982). As the Court noted
 17 in its previous order after citing this authority, “TNP does not dispute that it intentionally
 18 made transfers of Rents from the Operating Account to Breakwater, and Breakwater does
 19 not dispute that it intentionally accepted such transfers and controlled the Rests in its
 20 accounts.” Doc. 216 at 13. Both parties had the intent to commit the tort of conversion.

21 Nor does § 12-2506 require an intent to harm. It applies if Defendants committed
 22 an act “they were certain or substantially certain would result in the consequences
 23 complained of” – the conversion. *Chappell*, 247 P.3d at 194. It is undisputed that
 24 Breakwater and TNP intended to transfer the Rents out of the Operating Account and
 25 exercise dominion and control over them. Defendants were certain that this would result
 26 in the conversion of Plaintiff’s funds – the intentional exercise of dominion or control
 27 over the Rents, which would seriously interfere with Plaintiff’s right to control the Rents.
 28 Nothing more is needed for the tort of conversion. *Miller*, 104 P.3d at 203. What is

1 more, both Defendants were substantially certain that Plaintiff would exercise its legal
2 rights to the Rents. TNP even recommended setting aside funds to defend a potential
3 lawsuit and demanded that Breakwater indemnify it.

4 This is not a close question. The undisputed facts show that Breakwater and TNP
5 acted in concert to convert Plaintiff's Rents. Under § 12-2506, Breakwater and TNP are
6 jointly and severally liable for the \$605,000 in damages awarded to Plaintiff.

7 **IT IS ORDERED:**

8 1. Plaintiff's motion for summary judgment (Doc. 232) is **granted**.
9 2. Breakwater's motion to strike (Doc. 239) is **denied**.
10 3. The Clerk is directed to terminate this action.

11 Dated this 23rd day of September, 2015.

12
13
14 *David G. Campbell*
15 _____
16 David G. Campbell
United States District Judge
17
18
19
20
21
22
23
24
25
26
27
28